



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: SRC 00 089 50812 Office: Texas Service Center

Date: AUG 10 2000

IN RE: Petitioner:
Beneficiaries:



Petition: Petition for a Nonimmigrant Worker Pursuant to § 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(b)

Public Copy

IN BEHALF OF PETITIONER: Self-represented

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

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DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, who certified the decision to the Associate Commissioner for Examinations for review. The decision of the director will be affirmed.

The petitioner provides temporary staffing for the rooms and food and beverage divisions of different hotel properties. It seeks to employ the beneficiaries as kitchen stewards for 9 months. The certifying officer of the Department of Labor declined to issue a labor certification because the petitioner has a permanent need for these workers. The director determined that the petitioner had not established that the need for the services to be performed is temporary.

The petitioner states that the current low unemployment of less than 3% in the local area is a temporary event which has created a need for temporary workers. The petitioner also states that it has no regular employed workers other than management and office staff. The petitioner claims that it acts as an agent for its clients who are hotel and hospitality facilities.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(ii), defines an H-2B temporary worker as:

an alien...having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), as codified in current regulations at 8 C.F.R. 214.2(h)(6)(ii), specified that the test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. See 55 Fed. Reg. 2616 (1990).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. 214.2(h)(6)(ii)(B).

The Petition for a Nonimmigrant Worker (Form I-129) states that the employment is seasonal and the temporary need is recurring annually. The petitioner states in its "Memorandum of Law" that its temporary need is for a one-time occurrence, or possibly, an intermittent need.

The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(2) states that for the nature of the petitioner's need to be a seasonal need, the petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature.

The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(1) states that for the nature of the petitioner's need to be a one-time occurrence, the petitioner must establish that it will not need workers to perform the services or labor in the future.

The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(4) states that for the nature of the petitioner's need to be an intermittent need the petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

Performs any combination of the following activities: Washing and drying of dishes, pots, pans and trays. Polishing silver. Carries dirty dishes from dining room to kitchen. Washes worktables, walls, refrigerators, and meat blocks. Maintain kitchen work areas and restaurant equipment and utensils in clean and orderly condition. Sets up banquet tables. Washes and peels vegetables using knife or peeling machine. Loads or unloads trucks picking up or delivering supplies and food. Takes inventories of china, silverware, and glassware and reports shortages. Sweeps and mops floors. Segregates and removes trash and garbage and places it in designated containers. Steam-cleans or hoses-out garbage cans.

These duties cannot be classified as duties that are a one-time occurrence, seasonal, peakload, or intermittent. These duties are ongoing and will need to be performed in the future. The petitioner hires its own employees paying \$7.25 per hour and assigns them to a client to supplement the client's workforce. Therefore, the petitioner has a permanent need for workers. The petitioner is required to demonstrate that its intention is to employ the specific beneficiaries for only a temporary period. Here, the petitioner has not established that it needs to employ the beneficiaries for only a temporary period. The petitioner's

need for the services of the beneficiaries is permanent; the facility that needs the beneficiaries' services temporarily will not be the beneficiaries' employer.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The decision of the director is affirmed. The visa petition is denied.